Office - Supreme Court, U.S.
FILED
DEC 15 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-796

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JESSE BENJAMIN STONER,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT OF
CRIMINAL APPEALS OF ALABAMA

REPLY BRIEF OF PETITIONER

FLEMING LEE
300 Independence Avenue, S.E.
Washington, D.C. 20003
(202) 546-5611
Attorney for Petitioner

TABLE OF CONTENTS

	Page
Table of Cases	ii.
Pre-Indictment Delay Issue	1
Statute of Limitations	8
Conclusion	9
Certificate of Service	10

Table of Cases

	Page
Dickey v. Florida, 398 U.S. 30 (1970)	8
Furman v. Georgia, 408 U.S. 238 (1972)	8,9
Leonard v. Hey, 269 S.E. 2nd 394 (S.Ct. W.Va. 1980)	7,8
United States v. Habiq, 390 U.S. 222, 227 (1968)	9
United States v. Lovasco, 431 U.S. 783 (1977)	1,7,8,9
United States v. MacDonald, 102 S. Ct. 1497, 71 L. Ed. 2nd 696, 703	6
United States v. Marion, 404 U.S. 307 (1971)	6,7,8
United States v. Provenzano, 423 F. Supp. 62 (S.D. of N.Y. 1976)	9

ARGUMENT

I

PRE-INDICTMENT DELAY

Petitioner is the victim of by far the longest known delay between alleged commission of a crime and indictment for that crime -- a delay of nineteen years and eighty-eight days -- during which period the State of Alabama was able to show no relevant activity on its part. The delay grossly and cruelly violated the Petitioner's right to due process of law, thus, preventing his mounting an effective defense at his trial.

The Respondent dwells on the speedy trial issue, but Petitioner has never raised a speedy trial defense. The only relevance of the right to speedy trial to this case is that the philosophical basis for the speedy trial guarantee is obviously offended by inexcusably long and prejudicial pre-indictment delays. The requirement of speedy justice, whether before or after indictment, has been part of the common-law tradition since the Magna Carta. **United States v. Lovasco**, 431 U.S. 783,800 (1977) (Stevens, J., dissenting).

According to sworn testimony of John A. Yung, IV, Assistant Attorney General of Alabama, who testified at Petitioner's trial, the investigation of Petitioner ended on July 14, 1958. Mr. Yung testified:

> "Q. Anyway the main thing is your having gone over the information comprising the file. Has anything developed of a prosecutorial nature or evidentiary nature since July 14, 1958?
>
> "A. Not that I am aware of.
>
> "Q. You have access to the entire file on Mr. Stoner that the State of Alabama has, I'm sure.

"A. I have access to everything the Attorney General's offices had. Whether or not there is anything else, I do not know." (Tr. 423).

Petitioner next called to the witness stand Burton Dunn, who was one of the two prosecutors, who was Assistant District Attorney in Jefferson County. Dunn testified:

"Q. As such you have gone through and are familiar with the files in this matter?

"A. Yes, sir.

"Q. You know from having reviewed that file that the evidence that the State of Alabama has offered during the course of this trial has been the same evidence they had on July 14, 1958?

"A. Yes, sir.

"Q. It has not changed in one regard, has it?

"A. No, sir." (Tr. 419)

Thus, the record shows that the State of Alabama's two prosecutors admitted that the investigation of petitioner was concluded on July 14, 1958. Their testimony was at the end of the trial in a motion hearing. The motion was overruled. (Tr. 428)

Respondent's brief, in effect, admits that the pre-indictment delay of 19¼ years prejudiced the defense when it says that the petitioner presented a ludicrous defense. Respondent misrepresents the trial. In violation of the First Amendment, Respondent State of Alabama conducted a political prosecution by going into petitioner's alleged political, religious and social beliefs. Respondent cross examined him about what he publicly published in a newsletter when he was a candidate for Governor of Georgia in 1970, asked him about his alleged lack of Church attendance and other public statements. (Tr. 396, 397, et seq.) Such matters

were raised by Respondent to cause bias against Petitioner. Petitioner has never advocated violence. (Tr. 341, 342).

While the Respondent embellishes its brief with frequent references to matters not in the record, a study of the actual evidence reveals absolutely no continuing investigation of the alleged crime during the almost twenty year hiatus before Petitioner's indictment.

Unable to show any justification for its delay, the Respondent resorts to a set of abstract criteria which it says might under suitable circumstances justify some prolongation of the period between a criminal event and the indictment or arrest of someone for it, but here the Respondent only proves Petitioner's case.

The criteria on pages 18 and 19 of Respondent's Brief are paraphrased and italicized:

1. *Would delay result in loss of evidence?* In Petitioner's case defense witnesses died, and documents were destroyed or lost in the normal course of events. Furthermore, **any** delay of over 19 years would result in loss of evidence, if only through the fading of memories.

2. *Would delay help identify co-conspirators?* No co-conspirators were identified in Petitioner's case; there is not even real evidence of a search for co-conspirators, much less of any specific reason why the indictment of Petitioner would have hindered their identification.

3. *What effect would prosecution have on existing undercover operations?* There is no proof that in fact there was any such purpose for the delay in Petitioner's prosecution. Considering the length of the delay -- not far short of a fifth of a century -- the idea is laughable. A large proportion of the participants in the events of the 1950s had died or retired before Petitioner's indictment.

4. *Are there alternatives to prosecution?* One sees no possible applicability of this question to the delay on Petitioner's case.

Pages 17 and 18 of Respondent's brief point out that a prosecutor can decide when to prosecute. But a prosecutor's discretion is limited, among other things, by the prospective accused's rights to due process of law. Where the right to a fair defense is prejudiced, there are strongly countervailing factors. Additionally, the state interest in stopping crime and deterring criminals is in no way served by waiting over 19 years to prosecute. Proper social and criminological purposes are not served by waiting to prosecute a man in his fifties for the alleged crime of a 34 year old.* Petitioner was born on April 13, 1924. (Tr. 308)

Respondent's disseration (pages 18-23) on social conditions in the 1950's and 1960's, replete with factual details unsubstantiated by anything in the record, is a bald-faced admission that the State of Alabama attempted to (and did) gain a tactical advantage over Petitioner by stalling for time. The State, if it were doing anything related to the alleged crime, was admittedly waiting for the social climate to change so that there would be greater community prejudice against a person accused of such wrongdoing.

Even had there been any acceptable excuse for the early part of the delay, it would certainly not have countenanced a delay of over 19 years.

In its effort to depict the loss of Petitioner's witnesses and documentary evidence (as a result of Respondent's delay) as of no consequence to Petitioner's defense, the Respondent resorts to misrepresentation of the evidence. It was not Petitioner's fault that his former employer's records (which would have been valuable exculpatory evidence of his location during the period of the alleged crime) were destroyed in the ordinary course of business.

*There is no evidence of any criminal act by Petitioner, or any charge against him, except for the one alleged in this case.

A letter to Petitioner from the Regional Manager of State Farm Insurance Companies of the Regional Office which supervised petitioner in 1958 stated:

"Because of the sheer volume of paper work created by the very nature of an insurance operation, we find ourselves in the position of purging the kind of reports you referenced in your letter, as soon as we can legally do so. Daily reports on settlement activity and all weekly expense reports dating back twenty two years ago have been purged from our files for some time.

"About all we would be able to do is confirm that you were an employee of State Farm in May and June of 1958, and that you did indeed operate out of an office in Dublin, Georgia. (Tr. 558)

Likewise, no matter how many ways the Respondent restates what it was Petitioner was charged with (Respondent's brief, pages 3 and 24), Petitioner's alibi evidence would have been indisputably relevant and could have had a decisive effect on a jury. Furthermore, Petitioner is not "badly crippled" as offensively and dishonestly stated on page 25 of Respondent's brief. The evidence at trial was that Petitioner walks "with a slight limp." (Tr. 319) Petitioner thus could benefit from his evidence that he could not have been anywhere near the scene of the crime. Respondent's admission that "no one has any idea who actually placed the bomb at the church" (Respondent's brief, page 11), not only admits that the Petitioner, without such knowledge, could scarcely have been involved in a conspiracy to place the bomb, but also that a jury could well have been swayed by evidence removing Petitioner from the category of those who might have placed the bomb.

In its further attempts to discount the effect of the deaths of defense witnesses over the years, Respondent

makes the astonishing statement on page 24 of its brief that if the witnesses had been alive they would not have been permitted to testify to Petitioner's "self-serving" declarations. It would be a novel rule of law which barred witnesses from giving testimony favorable to an accused's defense.

Respondent makes a lot of its observation that Petitioner's affidavit "does not suggest that the Petitioner in anywise protested or took issue with Morris' alleged statement" that the police informant Morris had himself set off the bomb. (Respondent's brief, pages 10-11) Why the Petitioner's apparent failure to take issue with Morris' admission that Morris set off the bomb should be labeled by the Respondent an "admission against interest" (page 24 of brief) is mystifying. Certainly the testimony of witnesses that a man other than the Petitioner had admitted committing the crime could have been of the greatest import to a jury. Of that exculpatory testimony, as well as a great deal of other saving evidence that would have been available over the years immediately following the explosion of the bomb, the Petitioner was deprived by the State's delay.

The cases cited by the Respondent in its brief support the Petitioner's claim. Delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment. **United States v. MacDonald**, 102 S. Ct. 1497, 71, L. Ed. 2nd 696,703 (1982). Inordinate delay may impair a defendant's ability to present an effective defense: That particular interest is protected primarily by the Due Process Clause and statutes of limitation. **Id.** at 703-704. Due Process protects against purposeful or tactical delay that causes the accused actual prejudice at trial. **Id.** at 711.

United States v. Marion, 404 U.S. 307 (1971) involved a pre-indictment delay of only three years. There had not yet been a trial. The accused did not claim or demonstrate any specific prejudice, not was there any evidence of governmental delay to gain tactical advantage. This Court

said that events of the future trial might demonstrate actual prejudice, but that in the meantime the due process claims were premature and speculative. **Id.** at 326.

Marion did not reach the question of when and in what circumstances actual prejudice resulting from pre-accusation delays would require dismissal of the presecution, and suggested that "To accommodate the sound administation of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case." **Id.** at 325. Because of limitations of space in this brief, Petitioner can only refer the Court respectfully to Mr. Justice Brennan's concurring opinion in **Marion**. In the last paragraph of his concurring opinion, he wrote, "I think a three year delay even in that kind of case goes to the edge of permissible delay." **Id.** at 335. Such a delay of over 19 years would be much less permissible in a case such as Petitioner's.

United States v. Lovasco, 431 U.S. 783 (1977) concerned a mere 18 month delay in indictment, during which little information was uncovered and two witnesses died. The accused did not state how the witnesses would have aided his defense. There had not yet been a trial, the accused having moved to dismiss the indictment. The Court found that the year and a half delay was justified in that case by investigative necessity. (There is no evidence in Petitioner's case that Alabama knew any more about him in 1977 than it did in 1958.) The Court stated that investigative delay is fundamentally unlike delay undertaken to gain tactical advantage, and it specifically limited its holding in **Lovasco** to that particular case. (**Id.** at 795-796).

Respondent completely misrepresents and misconstrues **Leonard v. Hey**, 269 S.E. 2d 394 (S.Ct. W.Va, 1980), a case strongly favorable to Petitioner, when Respondent says that **Leonard** rejected this Court's holding in **Marion** and **Lovasco** and expressly refused to decide the case under

the Federal Constitution. **Leonard** involved pre-indictment delay of 11 years, and the Supreme Court of West Virginia held that for that reason there was prima facie prejudice to the accused, and infringement on his constitutional right to due process of law. and that unless the governement could justify the delay by proving its reasonableness, the accused was entitled to dismissal of the indictment.

Contrary to Respondent's assertions, **Leonard** relies on, rather than rejects, **Marion** and **Lovasco**, quoting approvingly from them. **Id**. at 396. It relies no less on them than on **Dickey v. Florida**, 398 U.S. 30 (1970), and it is untrue to say that West Virginia decided **Leonard** "under **Dickey v. Florida**." Furthermore, the **Leonard** court's statement that it need not interpret federal law to define due process was purely gratuitous and certainly implied no conflict between the West Virginia and the United States Constitutions.

Petitioner rejects (and a reading of **Leonard** will disprove) Respondent's claim that **Leonard** conflicts with the holdings of this Court -- while there is no doubt that the pertinent holdings of West Virginia and Alabama are in conflict, with Alabama the State which is in conflict with the relevant statements of this Court and with the Constitution of the United States.

II

STATUTE OF LIMITATIONS

On page 23 of Respondent's Brief and Argument In Opposition To The Writ, respondent admits "that the 1975 Code of Alabama would impose a statute of limitations forever barring the prosecution," which is an admission that the Alabama State legislature imposed a statute of limitations so as to comply with this Court's ruling in

Furman v. Georgia, 408 U.S. 238 (1972).

This Court has said "....Statutes of limitations which provide predictable legislatively enacted limits on prosecutorial delay, provide the primary guarantee against bringing overly stale criminal charges." **United States v. Lovasco**, 431 U.S. 783,789 (1977). In summarizing his discussion of this issue, petitioner contends that his case is analagous to the case of **United States v. Provenzano**, 423 F. Supp. 62 (S.D. of N.Y 1976). The court therein held that the limitations of prosecutions' provision expired with the capital nature of the crime.

Since no one was killed in this case, there was no way that the death penalty could have been imposed on petitioner after this Court rendered its decision in **Furman v. Georgia**, supra, in July of 1972. Therefore, he was entitled to Alabama's three year statute of limitations beginning at that time, if not in 1958.

Criminal statutes of limitation are to be interpreted liberally in favor of repose. **United States v. Habig**, 390 U.S. 222,227 (1968).

There is nothing in the record to support Respondent's claim (page 23 of Respondent's brief) that Petitioner's case was presented to the Grand Jury to stay within Alabama's statute of limitations.

CONCLUSION

The Petitioner was clearly deprived of his right to Due Process of Law by the Respondent's record-breaking delay of over 19 years between alleged crime and indictment. The Court has never dealt with precisely the same factual situation, but the statements of this Court in the most similiar cases strongly support the Petitioner's claim and point to the unconstitutionality of Petitioner's treatment by Respondent and of the holdings of the Alabama courts in

his case.

The petition for writ of certiorari should be granted.

Respectfully submitted,

Fleming Lee
Attorney for Petitioner
300 Independence Avenue, S.E.
Washington, D.C. 20003
(202) 546-5611

December 15, 1982

CERTIFICATE OF SERVICE

This is to certify that upon the date stated above, I have served a true copy of the within and foregoing Reply Brief of Petitioner, postage prepaid, to opposing counsel by sending three copies to:

Honorable Charles E. Graddick
Attorney General of Alabama
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 63130

Fleming Lee
Attorney for Petitioner